WAHAB IBRAHIM & ORS A

v.

AET TANKER HOLDINGS SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU B
VERNON ONG J
[SUIT NO: 23NCvC-171-09-2011]
28 SEPTEMBER 2012

CIVIL PROCEDURE: *Action - Cause of action - Whether claim in relation to illegal earnings - Ex turpi causa non oritur actio - Whether plaintiffs in possession of valid fishing licences or valid licences for fishing vessels and equipments - Whether claim allowed - Fisheries Act 1985, ss. 8 & 11* C

EVIDENCE: *Hearsay - Admissibility - Adjusters report - Whether based on research - Whether information verified independently - Whether truthfulness and accuracy of words spoken by another witness can be tested by cross-examination - Whether evidence admissible* D

TORT: *Negligence - Damages - Collision at sea - Spilling of crude oil into sea - Whether fishing activities restricted due to collision - Whether fishermen entitled to claim for losses - Whether fishermen in possession of valid fishing licences or valid licences for fishing vessels and equipments - Whether claim in relation to illegal earnings - Ex turpi causa non oritur actio - Whether claim allowed* E

FISHERIES: *Licence - Operating fishing vessel without valid licence - Whether an offence under ss. 8 & 11 Fisheries Act 1985* F

In 2010, a collision at sea occurred in the Singapore Straits which involved the defendant's marine vessel, MV Bunga Kelana 3 ('BK3') and another marine vessel. As a result of the collision, approximately 2,500 tons of light crude oil spilled in the Singapore Straits, entered into Malaysian waters and spread over the coast of Pengerang, Johor. As a result, the plaintiffs, fishermen carrying out their fishing activities along the coast of Pengerang, claimed for loss of income and damages due to their inability to carry out their usual fishing activities for six months thereafter and continuing. However, it was the defendant's contention that not all the plaintiffs were licensed fishermen at the material time and that as such, they were not entitled to make a claim against the defendant for their alleged losses under the Merchant Shipping (Liability and Compensation For Oil and Bunker Oil Pollution) Act 1994 ('MSOPA'). The defendant submitted that the plaintiffs did not suffer any loss and loss of earnings for a period of four months. The period for loss of earnings should be for five days only. Further, the plaintiffs were not entitled to any special damages as the material facts and G H I

particulars of loss and damages were not pleaded. It was the plaintiffs' claim that the impact of the oil pollution led to a complete loss of income in the first month and then a partial loss of half their income for the remaining three months. En Ishak bin Hussin, the 163rd plaintiff ('PW1') testified that he suffered a loss of income for four months due to the pollution which destroyed fish fry and prawns. However, in his claim form dated 24 June 2010 submitted through the Fisheries Department, PW1 had stated that the period of loss was five days. PW1 did not offer any plausible explanation for the discrepancy between what he stated in his claim form and his oral testimony. In further support of their claims, the plaintiffs also relied on the adjusters reports prepared by City Adjusters. The branch manager of City Adjusters ('PW3') testified that the reports were prepared based on his research and that the contamination led to fish stocks and marine life being killed. However, under cross-examination, PW3 admitted that his report was based on what was told to him by the plaintiffs. PW3 did not verify the information independently. The issues for determination, *inter alia*, were (i) whether the plaintiffs had a right to claim against the defendant; and (ii) whether the plaintiffs' fishing activities were restricted due to the spill, and if so for how many days.

Held (limiting claim to five days of loss):

(1) Fishing in Malaysian waters is a licensed activity governed by the Fisheries Act 1985 ('FA 1985'). It is an offence for any person to undertake any fishing activities in Malaysian fisheries waters without a valid licence under s. 8 FA 1985. In addition, a fisherman was also required to possess a licence for his fishing vessel and fishing gears or equipment under s. 11 FA 1985. Operating a fishing vessel without a valid licence is an offence under sub-s. (3). Only 24 of the individual plaintiffs appeared to be in possession of valid fishing licences and only 35 out of the 249 plaintiffs were in possession of valid licences for their fishing vessels and fishing equipments at the time of the incident. (paras 11, 13 & 14)

(2) The individual plaintiffs who were in possession of valid licences under s. 8 FA 1985 were entitled to make their claim against the defendant for the alleged loss under the MSOPA. The plaintiffs who were at the time of the incident in possession of either or both of the licences issued under ss. 8 and or 11 FA 1985 were undertaking their fishing activities legally. Thus, only 50 individual plaintiffs were entitled to make their respective claims against the defendant. (paras 15 & 19)

(3) In the absence of any explanation for the failure to produce their licences under ss. 8 and 11 FA 1985, the court was constrained to invoke adverse inference against the plaintiffs under s. 114(g) of the Evidence Act 1950, that those who did not produce their licences did not in fact possess any valid licences under ss. 8 and 11 FA 1985 at the time of the incident. As a general rule, a court of law will not entertain a claim for illegal earnings as found in the maxim *ex turpi causa non oritur actio* which means that a claimant will be unable to pursue a cause of action if it arose in connection with his own illegal act. (paras 16 & 17)

(4) PW1's evidence did not support the plaintiffs' case that the loss of income was for a period of four months. Further, PW3's evidence must be treated as hearsay evidence. As a general rule, hearsay evidence is inadmissible as proof of a fact which has been stated. The rule against the admission of hearsay was a fundamental rule. It was not the best evidence, and it was not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness could not be tested by cross-examination. Therefore, PW3's evidence and the adjusters reports were discounted in evidence for being inadmissible. (paras 21 & 23)

(5) The plaintiffs had not satisfied the evidential burden of proving the loss of income in the first month and then a partial loss of half their income for the remaining three months following the incident. The plaintiffs' assertion that the marine life was endangered was also unsupported. On the contrary, the evidence produced by the defendant indicated that a period of five days was not unreasonable in all the circumstances. (paras 31 & 32)

Case(s) referred to:

Chua Kim Suan & Teoh Teik Nam v. Government of Malaysia & Anor [1994] 1 CLJ 321 SC ***(foll)***

Dhlamini v. Protea Assurance [1974] (4) SA 906(A) ***(foll)***

Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors [2009] 5 CLJ 1 CA ***(refd)***

Leong Hong Khie v. Public Prosecutor And Tan Gong Wai v. Public Prosecutor [1984] 1 LNS 172 FC ***(refd)***

Pitts v. Hunt & Anor [1991] 1 QB 24 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

Fisheries Act 1985, ss. 8, 11(3)

For the plaintiffs - T Rajasekaran; M/s T Raja & Co

For the defendant - Arun Krishnalingam (Mathew Kurien with him); M/s Sativale Mathew Arun

Reported by Sandra Gabriel

JUDGMENT

Vernon Ong J:

[1] In 2010 a collision at sea occurred in the Singapore Straits involving two marine vessels. Consequently, a quantity of oil spilled in the Singapore Straits. The plaintiffs are claiming for loss of income and damage due to their inability to carry out their usual fishing activities as a result of the oil spill.

Brief Account Of The Facts

[2] On 25 May 2010, MV Bunga Kelana 3 ("BK3") a Malaysian registered marine vessel and a bulk freighter MV Wally (Wally) a St Vincent & Geraldines registered marine vessel were involved in a collision in the Singapore Straits close to Singapore island. As a result of the collision, approximately 2,500 tons of light crude oil spilled in the Singapore Straits. Some of the oil spill went down to Pengerang, Johor. The defendant is the registered owner of BK3.

Plaintiffs' Case

[3] Some of the oil spill entered into Malaysian waters and spread over the coast of Pengerang, Johor. The 249 plaintiffs are fishermen who carry out their fishing activities along the coast of Pengerang. The plaintiffs' claim is premised on the fact that due to the oil spill they were unable to carry out their usual fishing activities for six months thereafter and continuing. They are claiming for special damages to be assessed, general damages to be assessed, exemplary damages to be assessed together with interest and costs.

Defendant's Defence

[4] Even though the oil spill went down to Pengerang, Johor, the plaintiffs' fishing activities were not restricted as the plaintiffs could carry out their fishing activities in other areas at that time.

[5] It is also contended that not the whole fishing area and its limits as stated in the licences issued to the plaintiffs were affected as a result of the oil spill as alleged. The plaintiffs did not suffer any loss and loss of earnings for a period of four months. The period for loss of earnings should be for five days only. Further, the plaintiffs had involved themselves in other paid work throughout the period and with that they are not allowed to claim the said amount. The plaintiffs are not entitled to any special damages as the material facts and particulars of loss and damage were not pleaded. At any rate, the defendant is entitled to limit any liability, if any, under any of the applicable laws.

Background

[6] At the commencement of this action, 264 individuals were named as plaintiffs. However, at the trial of this action, learned counsel for the plaintiffs applied to delete the names of the 126th, 127th, 162nd, 168th, 172nd, 195th, 199th, 200th, 202nd, 203rd, 218th, 219th, 224th, 225th and 229th plaintiffs; consequently, the trial proceeded on the claims of the remaining 249 individual plaintiffs.

[7] For the expeditious and economical disposal of this action, the parties agreed at the onset of the trial to proceed solely on the issue of liability at the trial; and if liability is found, for damages to be assessed before the Deputy Registrar.

[8] The plaintiffs called three witnesses. They included En Ishak bin Hussin ("PW1") the 163rd plaintiff; En Hussain bin Abdul Latif ("PW2") the 37th plaintiff; and En Foo Chit Swee ("PW3") the branch manager with City Adjusters & Investigators Sdn Bhd. The defendant's five witnesses included Dr Mark Whittington ("DW1") the senior technical adviser in the employ of The International Tanker Owners Pollution Federation Limited, London ("ITOPF"); En Khairizam bin Abdul Hamid ("DW2") the branch manager of Spica Services (M) Sdn Bhd (Spica Malaysia); Captain K Sugumaran a/l Kolanthai ("DW3") the director and operations manager of Northsea Inspection & Survey Sdn Bhd ("Northsea"); En Abdul Hamid bin Yasin ("DW4") the director of Johor Fisheries Department (JFD); and En Abdullah bin Ismail ("DW5") the director of Lembaga Kemajuan Ikan Malaysia Negeri Johor (LKIM).

Findings Of The Court

Preliminary Issue - Eligibility And Right To Claim

[9] Before proceeding to deal with the principal issues, the court will consider the preliminary issue relating to eligibility and the respective plaintiffs' right to claim against the defendant for the alleged loss under the Merchant Shipping Liability And Compensation For Oil And Bunker (Oil Pollution) Act 1994 ("MSOPA 1994").

[10] It is the defendant's contention that not all the plaintiffs were licensed fishermen or involved in commercial fishing activities in Pengerang waters at the material time. The plaintiffs' right to claim must be a recognised right vested in the claimants at the material time of the incident and must not be freely available to the public at large.

[11] Fishing in Malaysian waters is a licensed activity governed by the Fisheries Act 1985 ("FA 1985"). It is an offence for any person to undertake any fishing activities in Malaysian fisheries waters without a valid licence (s. 8 FA 1985).

[12] According to the adjuster's reports issued by City Adjusters produced by Mr CS Foo only 24 of the individual plaintiffs appear to be in possession of valid fishing licences at the time of the incident. The 24 individuals in question are the 12th, 20th, 21st, 24th, 26th, 53rd, 69th, 84th, 87th, 103rd, 110th, 112th, 128th, 131st, 133rd, 134th, 143rd, 156th, 159th, 161st, 178th, 181st, 196th and 207th plaintiffs.

[13] It is also pertinent to point out that in addition to having a valid fishing licence, a fisherman is also required to possess a licence for his fishing vessel and fishing gears or equipment under s. 11 of the FA 1985. Operating a fishing vessel without a valid licence is an offence under sub-s. (3). It is therefore abundantly clear that this is a legal requirement for fishermen to have in possession a valid fishing vessel's licence before they undertake any fishing activity in Malaysian fisheries waters.

[14] In this regard, a perusal of the adjuster's reports issued by City Adjusters show that only 35 out of the 249 plaintiffs were in possession of valid licences for their fishing vessels and fishing equipments at the time of the incident. The individuals in question are the third, fifth, seventh, eighth, 11th, 20th, 35th, 37th, 46th, 53rd, 55th, 64th, 71st, 79th, 84th, 112th, 113th, 123rd, 124th, 125th, 136th, 138th, 143rd, 153rd, 155th, 156th, 157th, 159th, 160th, 161st, 163rd, 169th, 186th, 193rd and 207th.

[15] On a consideration of the aforesaid, it is clear that the individual plaintiffs who were at the material time in possession of valid licences under s. 8 of the FA 1985 are entitled to make their claim against the defendant for the alleged loss under the MSOPA 1994. The individual plaintiffs who were in possession of valid licences under s. 11 of the FA 1985 were undertaking fishing activity on their respective fishing vessels legally. Consequently, the court is prepared to accept that these 35 individual plaintiffs are also entitled to make their claim against the defendant for the alleged loss under the MSOPA 1994.

[16] As for the remaining plaintiffs, notwithstanding a notice to produce being served on the plaintiffs' solicitors calling upon them to produce all the plaintiffs' fishing licences, not all the plaintiffs did so. Instead, the other plaintiffs relied on the adjuster's reports by City Adjusters. In the absence of any explanation for the failure to produce their licences under

ss. 8 and 11 of the FA 1985, the court is constrained to invoke the adverse inference under para. (g) of s. 114 of the Evidence Act 1950 - that those who did not produce their licences did not in fact possess any valid licences under ss. 8 and 11 of the FA 1985 at the time of the incident.

[17] As a general rule, a court of law will not entertain a claim for illegal earnings. This rule is found in the maxim "*ex turpi causa non oritur actio*" which means that a claimant will be unable to pursue a cause of action if it arises in connection with his own illegal act. As Dillon LJ said in *Pitts v. Hunt & Anor* [1991] 1 QB 24 at p. 56G:

> The most commonly cited anglicisation of the maxim of Lord Mansfield in *Holman v. Johnson*, 1 Cowp. 341, 343 that "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act".

And at 57B, he said:

> That a defence of illegality can be pleaded to a case founded in tort is, in my judgment, clear, whether or not the defence is correctly called *ex turpi causa*.

[18] Further, in *Chua Kim Suan & Teoh Teik Nam v. Government of Malaysia & Anor* [1994] 1 CLJ 321 the Supreme Court held that income earned from illegal activity (illegal operation of a taxi) was illegally obtained and should be disallowed by reason that it was against public policy. The Supreme Court also referred to *Dhlamini v. Protea Assurance* [1974] (4) SA 906(A). In *Dhlamini* (*supra*) the claim of an unlicensed hawker for 20 years for loss of earnings was disallowed on the ground that such claims were against public policy.

[19] Applying the principles enunciated above to the facts of this case, it is the court's finding that the plaintiffs who were at the time of the incident in possession of either or both of the licences issued under ss. 8 and or 11 of the FA 1985 were undertaking their fishing activities legally. Therefore, the 50 individual plaintiffs who are entitled to make their respective claims against the defendant are as follows:

> 3rd, 5th, 7th, 8th, 11th, 12th, 20th, 21st, 24th, 26th, 35th, 37th, 46th, 53rd, 55th, 64th, 69th, 71st, 79th, 84th, 87th, 103rd, 110th, 112th, 113th, 123rd, 124th, 125th, 128th 131st, 133rd, 134th, 136th, 138th, 143rd, 153rd, 155th, 156th, 157th, 159th, 160th, 161st, 163rd, 169th, 178th, 181st, 186th, 193rd, 196th and 207th plaintiffs.

A **Issues For Determination**

[20] It is the plaintiffs' pleaded case that they could not continue with their fishing activities in the allocated waters under their licences for six months or more due to the oil spill incident and thereby suffered loss and damage. Accordingly, the principal issue for determination may be formulated as follows:

Whether The Plaintiffs' Fishing Activities Were Restricted Due To The Oil Spill, And If So, For How Many Days?

[21] It is the plaintiffs' claim that the impact of the oil pollution led to a complete loss of income in the first month and then a partial loss of half their income for the remaining three months. PW1 testified that he suffered a loss of income for four months which was caused by the pollution which destroyed fish fry and prawns. However, in his claim form dated 24 June 2010 submitted through the fisheries department, PW1 had stated that the period of loss was five days. PW1 did not offer any plausible explanation for the discrepancy between what he stated in his claim form and his oral testimony. In the circumstances, PW1's evidence is inconsistent and not plausible; consequently, PW1's evidence does not support the plaintiffs' case that the loss of income was for a period of four months. PW2 admitted under cross-examination that his claim was in fact limited to five days as that was the period during which he could not carry out his usual fishing activities.

[22] In further support of their claims, the plaintiffs also relied on the adjuster's reports prepared by City Adjusters - which stated *inter alia* that "in addition, the fishes, prawn and marine biology along the shoreline were destroyed as a result of the loss and affected income for more than four months". PW3 the branch manager of City Adjusters testified that the reports were prepared based on his research; and that the contamination led to fish stocks and marine life being killed. However, under cross-examination, PW3 admitted that his report was based on what was told to him by the plaintiffs. PW3 did not verify the information independently.

[23] In consequence of PW3's aforesaid admission, PW3's evidence must be treated as hearsay evidence. As a general rule, hearsay evidence is inadmissible as proof of a fact which has been stated. The rule against the admission of hearsay is a fundamental rule. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination (see *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors* [2009] 5 CLJ 1; [2009] 4 MLJ 610 CA; *Leong Hong Khie v. Public Prosecutor And Tan Gong Wai*

v. Public Prosecutor [1984] 1 LNS 172; [1986] 2 MLJ 206 FC). By reason of the foregoing, PW3's evidence and consequently, the adjuster's reports are hereby discounted in evidence for being inadmissible. A

[24] By reason of the foregoing, there does not appear to be any evidence produced by the plaintiffs to support their case. Be that as it may, it is necessary to examine the totality of the evidence to determine the actual number of days the plaintiffs were restricted from carrying out their fishing activities as a result of the oil spill. B

[25] At this point, it is pertinent to relate the events immediately following the incident. On 25 May 2010, Northsea was appointed to monitor and or conduct surveillance of any oil that spilled in Singapore waters encroaching Malaysian waters. Northsea carried out survey on BK3, the waters around Pengerang, Johor and shorelines surrounding thereat due to the oil spill. At the same time, the defendant through the Malaysian Marine Department initiated the clean-up operation. Four contractors, were appointed to do the shore clean-up and one contractor was appointed to do the sea clean-up. It is not disputed that oil was first sighted in the waters around Pengerang in the evening of 26 May 2010 and it landed on the beaches the following day. C D

[26] DW3 testified that the oil slick was spotted in Malaysian waters on 26 May 2010 evening in an area in the vicinity of Pengerang waters. DW3 confirmed that the oil slicks were seen in the Pengerang waters for about four to five days, which was from 26 May 2010 until 31 May 2010. DW3 said that sea clean-up operations took about three to four days and that the shore clean-up operations took about ten to 14 days. E F

[27] DW2 testified that from 25 May 2010 till 3 June 2010, the Johor Department of Environment ("DOE") set up a 24 hours surveillance operation room to monitor the impact of the oil spill. Air surveillance was also organised by the DOE from 25 May 2010 until 4 June 2010 to detect oil patches in Pengerang and nearby waters. As confirmed in DOE's letter dated 5 August 2010, by 4 June 2010 the oil patches in the Pengerang and nearby waters had already evaporated and or dispersed within five days. G

[28] In the absence of any evidence produced by the plaintiffs relating to how long the oil spill contamination actually last in and around Pengerang waters, the court will now consider the report carried out by ITOPF. Immediately after the incident, the defendant's P&I Club, the oil pollution insurer, requested ITOPF to provide technical services for the oil spill response and produce an impartial expert report on damage assessment arising from the incident. ITOPF then prepared a report entitled "On the environment impacts of oil contamination in Malaysia due to the collision between Bunga Kelana 3 and Wally on 25 May 2010". H I

[29] The ITOPF report was prepared by Dr Paul Vorwerk who is no longer with ITOPF. DW1 produced the ITOPF report (exh. D1). It stated that the oil which spilled in the incident was a light crude oil known as Bintulu Sweet Crude. The oil is likely to spread on the water surface and be volatile, evaporating quickly. The model predicted an initial rapid rate of evaporation with approximately 55% of the spilled oil removed from the sea surface within 24 hours. Evaporation was predicted to continue over the next four days, at an ever reducing rate, until an approximately total of 67% of the oil would have been lost through this natural process. ITOPF together with the DOE and the Malaysian Marine Department conducted an aerial helicopter survey on 31 May 2010. According to DW4, even from the outset, the oil presence was not such as to inhibit fishing activities and many fishermen had in fact went out to sea from 29 May 2010 onwards. By 9 June 2010, there was no oil sighted at sea at all. The ITOPF report also stated that it considered it likely that the five day fishery restriction was probably longer than strictly necessary based on the quantity and movement of the spilled oil from BK3.

[30] Is there any evidence to support the plaintiffs' assertion that the oil pollution had affected the marine life within the Pengerang area was destroyed and which led to the loss of income for four months? The only available evidence was given by DW1. DW1 is a marine biologist with a background in fisheries, aquaculture and environmental monitoring. DW1 completed his PhD in 1993 at the University of Liverpool and has worked in the Middle East, East Africa and Europe on a variety of marine and coastal projects. DW1 produced an independent technical report issued by ITOPF. This report contains a section dealing with the effects of the oil spill on the marine environment. The effects on the marine environment is contained in para. 6.4 of that report. In particular, it is reported that:

> The effects of dispersed oil on marine biota in the vicinity of the incident are not clear, however, no reports have been received from fisherman of tainted fish or shellfish which would indicate minimal uptake of oil by the commercially exploited marine fauna. Wild fish are highly mobile and therefore are likely to sense and avoid areas of contamination in the water column. Various scientific articles have reported that fish exposed to oil excrete the contaminant relatively rapidly, with more rapid excretion of short-chain hydrocarbons and a steady reduction in oil in the tissues to that of background concentrations.

At para. 7, the report concluded on the following terms:

> No reports of any effects on marine resources have been identified to date other than claims from fishermen, predominantly for lost income due to a closure of the fishery for seven days. The large exchange of

water between the Johor Straits and the South China Sea would be expected to have diluted any oil dispersed into the water column relatively quickly.

No evidence on additional environment effects were observed or reported as a result of the oil released during the incident and given the light nature of the oil, the extensive cleanup undertaken and the baseline of historic oiling in the vicinity, long term effects over and above those from background levels of oilings are unlikely.

[31] Apart from the above reports, there is no evidence to suggest that the marine life in the Pengerang area had been endangered. Neither was there any evidence of seafood contamination.

Conclusion

[32] In all the circumstances, the court is not satisfied that the plaintiffs have satisfied the evidential burden of proving the loss of income in the first month and then a partial loss of half their income for the remaining three months following the incident. The plaintiffs' assertion that the marine life was endangered is also unsupported. On the contrary, the evidence produced by the defendant indicates that a period of five days is not unreasonable in all the circumstances. Therefore, the plaintiffs' claim should be limited to five days of loss.

[33] For the foregoing reasons, the claim of the 3rd, 5th, 7th, 8th, 11th, 12th, 20th, 21st, 24th, 26th, 35th, 37th, 46th, 53rd, 55th, 64th, 69th, 71st, 79th, 84th, 87th, 103rd, 110th, 112th, 128th, 113th, 123rd, 124th, 125th, 131st, 133rd, 134th, 136th, 138th, 143rd, 153rd, 155th, 156th, 157th, 159th, 160th, 161st, 163rd, 169th, 178th, 181st, 186th, 193rd, 196th and 207th plaintiffs are allowed on the following terms:

(1) Their claim be limited to five days of loss; and

(2) Their loss of income to be referred to the Deputy Registrar for assessment.

[34] After hearing counsel's submission on costs, the court awarded costs of RM20,000 to the plaintiffs.